United Nations A/72/80

General Assembly

Distr.: General
26 April 2017
English
Original: Arabic/English/Spanish

Seventy-second session
Item 88 of the preliminary list*
Responsibility of international organizations

Responsibility of international organizations

Comments and information received from Governments and international organizations

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the articles on the responsibility of international organization at its sixty-third session, in 2011. In its resolution 66/100 of 9 December 2011, the General Assembly took note of the articles on the responsibility of international organizations, presented by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action.

2. In its resolution 69/126 of 10 December 2014, the General Assembly reiterated its commendation of the articles and requested the Secretary-General to invite Governments and international organizations to submit information on their practice regarding decisions of international courts, tribunals and other bodies referring to the articles on the responsibility of international organizations, as well as written comments on any future action regarding the articles. In addition, the Assembly decided to include the item in the provisional agenda of its seventy-second session, with a view to examining, inter alia, the question of the form that might be given to the articles.

3. By notes verbales dated 7 January 2015 and 12 January 2016, the Secretary-General invited Governments to submit, no later than 1 February 2017, their written comments on any future action regarding the articles on the responsibility of international organizations. In those notes verbales, he also invited Governments to submit information on practice regarding decisions of international courts, tribunals and other bodies referring to the articles. The Under-Secretary-General for Legal Affairs, the Legal Counsel, also addressed a communication dated 8 February 2016 to 22 international organizations and entities bringing to their attention resolution 69/126 and inviting them to submit, no later than 1 February 2017, comments and information in accordance with the request of the General Assembly.

* A/72/50.

17-06654 (E) 020517

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4. As at 26 April 2017, the Secretary-General had received written comments from nine Governments: Australia (dated 1 February 2017), Czechia (dated 2 February 2017), Denmark (joint submission of 18 April 2017), El Salvador (dated 17 January 2017), Finland (joint submission of 18 April 2017), Iceland (joint submission of 18 April 2017), Norway (joint submission of 18 April 2017), Oman (dated 18 June 2015) and Sweden (joint submission of 18 April 2017). He had also received written comments from 29 entities: Asian Development Bank (joint submission of 31 January 2017), Bank for International Settlements (joint submission of 31 January 2017), Black Sea Trade and Development Bank (joint submission of 31 January 2017), Caribbean Development Bank (joint submission of 31 January 2017), Council of Europe Development Bank (joint submission of 31 January 2017), Food and Agriculture Organization of the United Nations (joint submission of 31 January 2017), Inter-American Investment Corporation (joint submission of 31 January 2017), International Bank for Reconstruction and Development (joint submission of 31 January 2017), International Civil Aviation Organization (joint submission of 31 January 2017), International Criminal Court (dated 24 March 2017), International Development Association (joint submission of 31 January 2017), International Labour Organization (ILO) (joint submission of 31 January 2017), International Maritime Organization (joint submission of 31 January 2017), International Monetary Fund (joint submission of 31 January 2017), International Organization for Migration (joint submission of 31 January 2017), International Telecommunication Union (joint submission of 31 January 2017), Multilateral Investment Guarantee Agency (joint submission of 31 January 2017), Nordic Investment Bank (joint submission of 31 January 2017), Organization for Economic Cooperation and Development (dated 27 March 2017), United Nations Educational, Scientific and Cultural Organization (joint submission of 31 January 2017), United Nations Industrial Development Organization (joint submission of 31 January 2017), Universal Postal Union (joint submission of 31 January 2017), West African Development Bank (joint submission of 31 January 2017), World Bank (dated 18 March 2016), World Health Organization (joint submission of 31 January 2017), World Intellectual Property Organization (joint submission of 31 January 2017), World Meteorological Organization (dated 22 February 2017) and World Trade Organization (joint submission of 31 January 2017). The United Nations also submitted written comments (dated 2 February 2017).

II. Comments on any future action regarding the articles on the responsibility of international organizations

A. Comments by Governments

Australia

[Original: English]
[1 February 2017]

While valuing the contribution that the International Law Commission's articles on the responsibility of international organizations have made to discussions on the topic, Australia would not support the elaboration of a convention on the basis of the articles. Australia observes that there remain significant differences of opinion among States on the principles that should govern the responsibility of international organizations. Australia is therefore of the view that the level of consensus that would be required to successfully conclude a convention is not currently present.

Czechia

[Original: English]
[2 February 2017]

In view of the insufficient relevant practice and the fact that the articles on the responsibility of international organizations represent not only codification but also progressive development of international law, the Czech Republic would currently favour the articles being adopted as an annex to a General Assembly resolution. Under such circumstances the articles may become proof of the existence of an *opinio juris* if they are applied in practice, similar to the articles on responsibility of States for internationally wrongful acts.

Denmark, Finland, Iceland, Norway and Sweden (joint submission)

[Original: English]
[18 April 2017]

The Nordic countries would like to thank the International Law Commission for its work on the articles on the responsibility of international organizations. We note that in general the articles, together with the commentary, already serve as a useful tool for practitioners and scholars.

In drafting the articles on the responsibility of international organizations, the Commission relied on the relevant articles on State responsibility. We would like to underline that we support this approach. However, as the Commission has recognized, the nature of international organizations merits a number of modifications and alternative solutions. Careful consideration should in this respect be made of the particular role and functions of organizations in international cooperation.

Furthermore, while the Nordic countries are generally supportive of the substantive content of the articles, we also realize that at this stage they are not always based on consistent and general practice. On certain issues, for example some aspects of attribution and the precise nature of a dual responsibility for international organizations and their member States, it seems that the law is not settled to a degree that merits codification in a convention.

Therefore, while we congratulate the Commission on bringing the articles on the responsibility of international organizations an important step further towards maturity, we also query whether the articles have matured or crystallized to such a degree that they will ultimately be ratified by an adequate number of States.

The Nordic countries find that these articles for now should continue to serve as useful inspiration, and be further refined, in the future practice of States and international organizations. For these reasons, at present we do not support the elaboration of a convention.

The Nordic countries would like to express their appreciation to the International Law Commission for taking note of and acting on our previously submitted comments. We would highly appreciate the Commission taking into account, in any further work on this important topic, the observations made by the Nordic countries in connection with the sixty-first session of the Commission in 2009, regarding certain aspects of the commentary to the present draft article 7 and the responsibility of international organizations in peacekeeping operations.[1]

[1] See A/C.6/64/SR.15, paras. 25-27.

El Salvador

[Original: Spanish]
[17 January 2017]

In the previous sessions in which the topic was considered, El Salvador observed with satisfaction the conclusion of the work carried out by the International Law Commission and by the Special Rapporteur, Giorgio Gaja,[2] and hereby reaffirms its support for the important work of codification and progressive development undertaken by the Commission.

El Salvador recognizes the importance of the principle of responsibility in international law. By that principle, every act attributable to a State or an international organization that constitutes a breach of an obligation in force for the same is an internationally wrongful act and entails international responsibility. Therefore, as in the case of States, an international organization that interacts with other subjects of international law must also be required to incur certain consequences as a result of its acts.

Although the articles adequately reflect this principle, adopting a binding instrument on the subject still poses multiple difficulties due to the scarcity of practice on its application to the large variety of international organizations. To discuss the form that the articles drafted by the Commission should take in the future, it would be immensely useful to have previously examined the initial compilation of the decisions taken by international courts, tribunals and other bodies that will be submitted by the Secretary-General during the current session.

In the light of the above, the Republic of El Salvador considers that the item should remain on the agenda of the Sixth Committee, with a view to monitoring practice with regard to the responsibility of international organizations and to then deciding at a later date whether the articles are ripe for uniform application.

Oman

[Original: Arabic]
[18 June 2015]

1. Overview of the articles on the responsibility of international organizations

There has been an increase in the number of international organizations, which now implement a wide range of mandates and play a prominent and unprecedented role in the international arena. The International Law Commission is to be commended for its efforts to formulate principles for establishing the international responsibilities of such organizations. However, despite its commendable efforts, the Commission has encountered a number of difficulties because there is little existing practice in this area. In addition, international organizations are very diverse, as are their purposes, and they are also different in nature from States.

The United Nations will naturally be affected by those principles because they will guide its practice and the practice of Member States. They will also guide the practice of regional and specialized agencies.

The articles have been formulated along the same lines as the articles on the responsibility of States. Much work has been done on the responsibility of States, and there are numerous international judicial precedents, norms and legal writings in that regard. Indeed, the principles established in that area are well known.

[2] See A/C.6/66/SR.18, paras. 45-47.

Not very much has been written regarding the responsibility of international organizations, and not all of the relevant principles and terms are in line with United Nations practice.

2. Articles on the responsibility of international organizations

International responsibility is defined as the body of legal provisions applicable to subjects of international law should they perpetrate acts that violate their international obligations and cause harm to other subjects of international law.

The articles establish the responsibility of an international organization for an internationally wrongful act and that such actions are attributable to that organization and its organs. The articles also provide for circumstances precluding wrongfulness for illegal actions and reparation for the injury caused by the internationally wrongful act.

Formulating articles on the responsibility of international organizations will undoubtedly contribute to the codification of international law insofar as:

(a) They will establish key considerations in terms of the responsibility of international organizations and will clarify how States should take those considerations into account;

(b) They will constitute recognition that organizations have the right to do so;

(c) A systematic approach in this area will strengthen the reparation mechanisms provided under international law and bolster international peace and security;

(d) The articles will complement efforts by the International Law Commission to codify international law, thereby strengthening the rule of law at the international level.

3. Views

Although most established norms on international responsibility have been codified in international law, certain articles do not draw on the practices and established norms of States or international tribunals. With a view to entrenching those articles and increasing familiarity with them, we believe that they should be included, as a first step, in a non-binding document that can serve as a source of guidance for countries and international tribunals. If the new principles become entrenched, negotiations could be held with a view to enshrining them in a binding international instrument.

B. Comments by international organizations

1. International Criminal Court

5. As to the future action regarding the articles on the responsibility of international organizations, the International Criminal Court underscores the relevance of this topic and would like to be involved in any further consideration regarding the articles.

Asian Development Bank, Bank for International Settlements, Black Sea Trade and Development Bank, Caribbean Development Bank, Council of Europe Development Bank, Food and Agriculture Organization of the United Nations, Inter-American Investment Corporation, International Bank for Reconstruction and Development, International Civil Aviation Organization, International Development Association, International Labour Organization, International Maritime Organization, International Monetary Fund, International Organization for Migration, International Telecommunication Union, Multilateral Investment Guarantee Agency, Nordic Investment Bank, United Nations Educational, Scientific and Cultural Organization, United Nations Industrial Development Organization, Universal Postal Union, West African Development Bank, World Health Organization, World Intellectual Property Organization and World Trade Organization (joint submission)

6. In the general commentary that accompanies the articles on the responsibility of international organizations, the International Law Commission states that the main difficulty that it faced in elaborating those articles was the limited availability of pertinent practice. The scarcity of relevant practice renders the Commission's work on the responsibility of international organizations predominantly an exercise in the progressive development of international law. As a statement about how international law ought to evolve, many of the articles remain controversial. Together, these features explain why caution is warranted before relying on the articles. These features also explain why, in our view, negotiating a treaty based on these articles would be premature.

7. The International Law Commission's general commentary describes some of the reasons for practice related to the responsibility of international organizations being so limited. The main reason, according to the Commission, is that "practice concerning responsibility of international organizations has developed only over a relatively recent period".[3] Another is "the limited use of procedures for third-party settlement of disputes to which international organizations are parties".[4] As a result, the Commission itself recognizes that, for many of the articles, "the border between codification and progressive development" is moved "in the direction of the latter".[5]

8. Practice relating to the responsibility of international organizations is not accumulating quickly. The organizations that have signed these comments have not identified any examples of practice that match the United Nations Legal Counsel's request. Thus, the challenges that the International Law Commission faced in its initial efforts to develop the articles persist at present.

9. Furthermore, as the International Law Commission developed the draft articles, numerous international organizations submitted comments, both individually and jointly, in which they raised serious concerns both about the Commission's overall approach and about particular draft articles.[6] These concerns included the excessive alignment of the articles on the responsibility of States and international organizations, notwithstanding the significant differences between States and international organizations and the significant differences among international organizations. We welcome the commentaries that the Commission added and the modifications that it made to the draft articles in response to these submissions. In particular, we appreciate the recognition in the general commentary of the principle of speciality and of the fundamental importance of article 64 (*lex specialis*). We also

[3] See A/66/10, para. 88 (general commentary, para. 5).
[4] Ibid.
[5] Ibid.
[6] See A/CN.4/545, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, A/CN.4/593 and Add.1, A/CN.4/609 and A/CN.4/637 and Add.1.

appreciate the confirmation that the articles represent secondary rules. In other areas, however, the commentaries and modifications did not adequately address our manifold concerns.

10. Because many of the articles remain controversial and largely unsupported by practice, we urge great caution in relying on the articles as an authoritative statement of positive law. We respectfully call attention to the International Law Commission's general commentary on the consequences of the diverging levels of practice underpinning its work on the responsibility of States, on the one hand, and the responsibility of international organizations, on the other, and in particular the Commission's recognition that "the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility".[7]

11. Under these circumstances, we likewise urge great caution with respect to any future action concerning the articles. In our view, any steps towards negotiating a convention based on the articles would be premature. In resolutions 66/100 of 9 December 2011 and 69/126 of 10 December 2014, the General Assembly took note of the articles and commended them to the attention of Governments without prejudice to the question of their future adoption or further appropriate action. In our view, no further action by the Assembly is necessary at this time.

2. Organization for Economic Cooperation and Development

12. [The Organization for Economic Cooperation and Development submitted comments that were substantially similar to the joint submission of 31 January 2017.]

3. United Nations

13. We note that the International Law Commission, when it submitted the draft articles on the responsibility of international organizations to the General Assembly, recommended to the General Assembly "to consider, at a later stage, the elaboration of a convention on the basis of the draft articles" (A/66/10, para. 85 (b)).

14. However, we are also conscious of the fact that the articles on the responsibility of international organizations are intrinsically linked to the articles on the responsibility of States for internationally wrongful acts. In this regard, we note that, at the seventy-first session of the General Assembly, the Sixth Committee established a working group on the responsibility of States for internationally wrongful acts to further examine the question of a convention on the topic or other appropriate action on the basis of the articles drafted by the International Law Commission (A/71/505, para. 5).

15. We also note that the General Assembly, in its resolution 71/133 of 13 December 2016 on the responsibility of States for internationally wrongful acts:

(a) Acknowledged the possibility of requesting, at its seventy-fourth session, the Secretary-General to provide the General Assembly with information on all procedural options regarding possible action on the basis of the articles, without prejudice to the question of whether such possible action is appropriate (para. 5);

(b) Encouraged all Member States to continue the substantive dialogue on an informal basis during the period prior to the seventy-fourth session of the Assembly (para. 7);

(c) Decided to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a

[7] See A/66/10, para. 88 (general commentary, para. 5).

convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles (para. 8).

16. In the light of the above, the General Assembly could consider any future action regarding the articles on the responsibility of international organizations on the basis of any action taken with respect to the articles on the responsibility of States for internationally wrongful acts at the seventy-fourth session of the Assembly or at its subsequent sessions. This approach also seems to be warranted in view of the fact that there does not appear to be significant new practice related to the articles since the Assembly took note of them at its sixty-sixth session. Consequently, at this stage, the Assembly may not have sufficient materials before it to take a decision on the future status of the articles.

4. World Bank Group

17. The World Bank has no additional comments to make at this stage, other than those already communicated in 2011.[8]

5. World Meteorological Organization

18. The World Meteorological Organization shares the views expressed in the joint submission submitted by the World Intellectual Property Organization on 31 January 2017.

III. Information on practice regarding the articles on the responsibility of international organizations

A. Information submitted by Governments

Australia

[Original: English]
[1 February 2017]

Australia has not been party to any proceedings before international courts, tribunals or other bodies in which the articles on the responsibility of international organizations have been considered.

The articles have not been considered by domestic Australian courts or tribunals.

Czechia

[Original: English]
[2 February 2017]

As regards the Secretary-General's request for information concerning the decisions of international courts, tribunals and other bodies referring to the articles on the responsibility of international organizations, the Czech Republic is not aware of any such decision. The Czech Republic would only mention that the Advocate General of the Court of Justice of the European Union, Nils Wahl, refers to the articles in his opinion in the joint cases C-8/15 P, C-9/15 P and C-10/15 P.[9]

[8] See A/CN.4/637.

[9] *Ledra Advertising Ltd and others v. European Commission and European Central Bank*, Opinion of Advocate General Wahl, 21 April 2016.

El Salvador

[Original: Spanish]
[17 January 2017]

With regard to the requested information on national practice in the matter, there is no record of the application of the articles on the responsibility of international organizations in El Salvador.

B. Information submitted by international organizations

1. International Criminal Court

19. As to information regarding the International Criminal Court's practice in connection with decisions of international courts, tribunals and other bodies referring to the articles on the responsibility of international organizations, there are no known references to the articles in the Court's judicial decisions.

2. International Labour Organization

20. To date, the International Labour Organization has no practice to report in connection with decisions of international courts, tribunals or other bodies referring to the articles on the responsibility of international organizations.

3. Asian Development Bank, Bank for International Settlements, Black Sea Trade and Development Bank, Caribbean Development Bank, Council of Europe Development Bank, Food and Agriculture Organization of the United Nations, Inter-American Investment Corporation, International Bank for Reconstruction and Development, International Civil Aviation Organization, International Development Association, International Labour Organization, International Maritime Organization, International Monetary Fund, International Organization for Migration, International Telecommunication Union, Multilateral Investment Guarantee Agency, Nordic Investment Bank, United Nations Educational, Scientific and Cultural Organization, United Nations Industrial Development Organization, Universal Postal Union, West African Development Bank, World Health Organization, World Intellectual Property Organization and World Trade Organization (joint submission)

21. The organizations that have signed these comments have not identified any examples of practice that match the United Nations Legal Counsel's request.

4. Organization for Economic Cooperation and Development

22. The Organization for Economic Cooperation and Development has no practice with regard to decisions of international courts, tribunals and other bodies relating to the articles on the responsibility of international organizations.

5. United Nations

23. The United Nations wishes to confirm that it has no further materials to share at this stage regarding decisions of international courts, tribunals and other bodies referring to the articles and information on the practice of Governments and international organizations with respect to the articles.

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United Nations A/72/81

General Assembly

Distr.: General
26 April 2017

Original: English

Seventy-second session
Item 88 of the preliminary list*
Responsibility of international organizations

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Compilation of decisions of international courts and tribunals

Report of the Secretary-General

Contents

		Page
	Abbreviations	3
I.	Introduction	4
II.	Extracts of decisions referring to the articles on responsibility of international organizations	5
	General comments	5
	Part Two The internationally wrongful act of an international organization	6
	Chapter I. General principles	6
	Article 4. Elements of an internationally wrongful act of an international organization	6
	Chapter II. Attribution of conduct to an international organization	7
	General comments	7
	Article 6. Conduct of organs or agents of an international organization	8
	Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization	9
	Article 8. Excess of authority or contravention of instructions	16
	Part Four The implementation of the international responsibility of an international organization	17
	Chapter I. Invocation of the responsibility of an international organization	17

* A/72/50.

17-06659 (E) 240517

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Article 48. Responsibility of an international organization and one or more States or international organizations 17

Part Five
Responsibility of a State in connection with the conduct of an international organization 18

Article 61. Circumvention of international obligations of a State member of an international organization 18

Article 62. Responsibility of a State member of an international organization for an internationally wrongful act of that organization 19

Part Six
General provisions 19

Article 67. Charter of the United Nations 19

Abbreviations

DARIO	Draft articles on the responsibility of international organizations
DARS	Draft articles on responsibility of States for internationally wrongful acts
ECHR	European Court of Human Rights
ECT	Energy Charter Treaty
EU	European Union
EUNAVFOR	European Union-led naval force
FET	Fair and equitable treatment
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISAF	International Security Assistance Force
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe
PPA	Power Purchase Agreement
REIO	Regional Economic Integration Organization
SG	Secretary-General
SRSG	Special Representative of the Secretary-General
TCN	Troop-Contributing Nation
UAAC	Ultimate Authority and Control
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

I. Introduction

1. The International Law Commission adopted the articles on the responsibility of international organizations at its sixty-third session, in 2011. In its resolution 66/100 of 9 December 2011, the General Assembly took note of the articles on the responsibility of international organizations presented by the Commission, the text of which was annexed to that resolution, and commended them to the attention of governments and international organizations without prejudice to the question of their future adoption or other appropriate action.

2. In its resolution 69/126 of 10 December 2014, the General Assembly commended once again the articles on the responsibility of international organizations to the attention of governments and international organizations without prejudice to the question of their future adoption or other appropriate action. Moreover, the Assembly requested the Secretary-General to invite governments to submit their written comments on any future action regarding the articles. It also requested the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles, to invite governments and international organizations to submit information on their practice in this regard and to submit the material well in advance of its seventy-second session.

3. By notes verbales dated 7 January 2015 and 12 January 2016, the Secretary-General invited governments to submit, no later than 1 February 2017, their written comments on any future action regarding the articles on the responsibility of international organizations. In those notes, he also invited governments to submit information regarding practice relating to decisions of international courts, tribunals and other bodies referring to the articles. The Under-Secretary-General for Legal Affairs, the Legal Counsel, also addressed a communication, dated 8 February 2016, to 22 international organizations and entities bringing to their attention resolution 69/126, and inviting them to submit, no later than 1 February 2017, comments and information in accordance with the request of the General Assembly.

4. The present compilation includes an analysis of nine cases in which the articles on the responsibility of international organizations were referred to in decisions by international courts, tribunals and other bodies taken during the period from 1 January 2004 to 31 December 2016.[1] Such references were found in the decisions of an international arbitral tribunal; the African Commission on Human and Peoples' Rights; the European Court of Human Rights; the Caribbean Court of Justice and the General Court of the European Union. The compilation also includes 12 decisions by domestic courts in Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland. Those decisions were found during the search for references to the articles in decisions by international courts, tribunals and other bodies, and have been included for the benefit of Member States. Given the scope of the compilation, which is limited to international decisions, the Secretariat did not conduct a systematic search of domestic jurisdictions.

5. The present compilation reproduces the relevant extracts of publicly available decisions under each of the articles referred to by international, and sometimes national, courts, tribunals or bodies, following the structure and numerical order of the articles on the responsibility of international organizations as adopted on second reading in 2011. Under each article, decisions appear in chronological order. Decisions by different courts concerning the same case are grouped together. International decisions are listed separately from national decisions.

[1] Joined cases that resulted in the same decision have been counted as one case. Cases that resulted in largely similar decisions have been counted separately, but might have been referred to as one decision to the extent that the content of the decisions is identical.

6. The compilation includes only the relevant extracts of the decisions referring to the articles on the responsibility of international organizations, together with a brief description of the context in which the reference was made. In those extracts, the articles are invoked as the basis for the decision or referred to as reflecting the existing law governing the issue at hand. The compilation does not cover the submissions of the parties invoking the articles, nor opinions of judges appended to a decision.[2]

II. Extracts of decisions referring to the articles on responsibility of international organizations

General comments

International decisions

General Court of the European Union

7. In *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, the General Court observed that "the applicant relies on various provisions of [the] draft articles on the responsibility of international organisations for internationally wrongful acts, as adopted in 2011 by the International Law Commission of the UN, in order to argue that by adopting the contested decision the Council renders the European Union liable under international law for an internationally wrongful act".[3] However, the General Court concluded that

> that plea in law does not introduce anything new with regard to the applicant's other arguments. It must be recalled that the present action is an action for annulment and not an action for damages. The issue is not whether the European Union has incurred non-contractual liability by adopting the contested decision, which presupposes that that decision is vitiated with illegality. The issue is whether in fact the contested decision is vitiated with illegality.[4]

National decisions

Supreme Court of the Netherlands

8. In *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, the Supreme Court of the Netherlands observed that:

> In establishing the rules developed in unwritten international law for deciding on what conditions conduct can be attributed to a State or to an international organization, the Supreme Court will refer to two sets of rules drawn up by the International Law Commission (ILC) of the United Nations, namely the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001

[2] See the "Dissenting opinion of Judge Pinto de Albuquerque", in European Court of Human Rights, *Sargsyan v. Azerbaijan*, application No. 40167/06, judgment (merits), 16 June 2015, para. 31 (footnote 59); the "Concurring opinion of Judge Keller", in European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, application No. 5809/08, judgment, 21 June 2016, para. 26 (footnote 8); and the "Opinions of the Lords of Appeal", in House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, case No. [2007] UKHL 58, judgment, 12 December 2007, para. 65.

[3] General Court of the European Union (Eighth Chamber), *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, case No. T-512/12, judgment, 10 December 2015, para. 212.

[4] Ibid., para. 213.

(below: DARS) and the Draft Articles on the Responsibility of International Organizations of 2011 (below: DARIO).[5]

England and Wales High Court (Queen's Bench Division)

9. The England and Wales High Court (Queen's Bench Division) in *Kontic and Others v. Ministry of Defence* stated that:

> The draft Articles and Commentary from the ILC are deserving of respect. However, as the Defendant points out, none of these provisions constitute a treaty, nor do they constitute customary international law. The UN General Assembly "took note" of the DARIO and "commended" them on 9 December 2011 "without prejudice to the question of their future adoption". A similar formulation was expressed by the General Assembly in 2014.[6]

The court explained that it "pay[s] regard to this material in exactly that manner".[7]

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

Article 4
Elements of an internationally wrongful act of an international organization

International decisions

European Court of Human Rights

10. In its decision on admissibility in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the Grand Chamber of the European Court of Human Rights referred to article 3 (now article 4) of the articles on the responsibility of international organizations as relevant law and practice.[8] Explaining the structure of its decision, the court stated that it

> has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII [of the Charter of the United Nations] framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations.[9]

[5] Supreme Court of the Netherlands (First Chamber), *State of the Netherlands v. Mustafić-Mujić*, case No. 12/03329, judgment, 6 September 2013, para. 3.7, and *State of the Netherlands v. Nuhanović*, case No. 12/03324, judgment, 6 September 2013, para. 3.7.

[6] Royal Courts of Justice (England and Wales High Court, Queen's Bench Division), *Kontic and Others v. Ministry of Defence*, case No. HQ14X02291, judgment, 4 August 2016, para. 116.

[7] Ibid., para. 117.

[8] European Court of Human Rights (Grand Chamber), *Behrami and Behrami v. France* application No. 71412/01 and *Saramati v. France, Germany And Norway*, application No. 78166/01, decision (admissibility), 2 May 2007, para. 29.

[9] Ibid., para. 121.

European Court of Human Rights

11. In assessing admissibility in *Berić and Others v. Bosnia and Herzegovina*, the Grand Chamber of the European Court of Human Rights referred to article 3 (now article 4) of the articles on the responsibility of international organizations as relevant law and practice.[10] The court further noted that "the applicants pleaded that the UN did not exercise 'effective control' over the conduct of the High Representative within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations and that, accordingly, the conduct in question was not attributable to the UN".[11] After examining the nature of delegation of powers from the Security Council to the High Representative, the court "observe[d] that the High Representative was exercising lawfully delegated UNSC Chapter VII powers, so that the impugned action was, in principle, 'attributable' to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations".[12] The court thus "conclude[d] that the applicants' complaints must be declared incompatible *ratione personae* within the meaning of Article 35 § 3 of the [European] Convention".[13]

England and Wales High Court (Queen's Bench Division)

12. In the case of *Kontic and Others v. Ministry of Defence*, the England and Wales High Court (Queen's Bench Division), while discussing the case of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* before the European Court of Human Rights, noted that: "The [European] Court next considered whether the relevant actions or omissions were attributable to the UN. The Court: '... used the term "attribution" in the same way as the ILC [International Law Commission] in Article 3 of its draft Articles on the Responsibility of International Organisations'".[14] The court ultimately concluded that "the relevant acts and omissions complained of are as a matter of law attributable to the United Nations, and not to the United Kingdom".[15]

Chapter II
Attribution of conduct to an international organization

General comments

International decisions

International arbitral tribunal (under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States)

13. The arbitral tribunal in the case of *Electrabel S.A. v. Hungary* referred to a letter by Hungary citing an academic article,[16] and explained that the author, Frank Hoffmeister,

[10] European Court of Human Rights (Fourth Section), *Berić and Others v. Bosnia and Herzegovina*, application Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, decision (admissibility), 16 October 2007, para. 8.

[11] Ibid., para. 22.

[12] Ibid., para. 28.

[13] Ibid., para. 30.

[14] Royal Courts of Justice, *Kontic and Others v. Ministry of Defence*, para. 81.

[15] Ibid., para. 135. On the reasoning of the court, see para. 30.

[16] See Frank Hoffmeister, "Litigating against the European Union and its Member States — Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", *European Journal of International Law*, vol. 21, No. 3 (2010).

> there concluded that the conduct of a State that executes the law or acts under the normative control of an REIO (i.e. a Regional Economic Integration Organization as defined in Article 1 ECT) may be considered an act of that organisation under international law, taking account of the nature of the organisation's external competence and its international obligations in the field where the conduct occurred; and, specifically in regard to the ECT, Professor Hoffmeister expressed the view that "liability would normally fall upon the EU if Member States' organs were simply implementing EU law".[17]

The tribunal decided that:

> For these reasons ... that if and to the extent that the European Commission's Final Decision required Hungary, under EU law, prematurely to terminate Dunamenti's PPA, that act by the Commission cannot give rise to liability for Hungary under the ECT's FET standard.[18]

National decisions

Supreme Court of the Netherlands

14. The Supreme Court of the Netherlands, in *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, explained that:

> The Commentary on Part Two, Chapter II DARIO (at [para. (4)]) notes that articles 6-9 DARIO do not necessarily mean that conduct must be exclusively attributed to an international organization — thereby resulting in exclusive responsibility of the international organization — but instead leave open the possibility of conduct being attributed to an international organization and a State, which would then result in dual attribution to the international organization and the State concerned.[19]

Article 6
Conduct of organs or agents of an international organization[20]

European Court of Human Rights

15. In the case of *Jaloud v. The Netherlands* the Grand Chamber of the European Court of Human Rights considered the cases of *Mustafić v. State of the Netherlands* and *Nuhanović v. State of the Netherlands* before Dutch courts as relevant domestic case-law.[21] In this context, the court cites excerpts from the judgment of the Supreme Court of the Netherlands in *State of the Netherlands v. Nuhanović* that discusses article 6 of the articles of the responsibility of international organizations.[22]

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[17] International Centre for Settlement of Investment Disputes, case No. ARB/07/19, award, 25 November 2015, para. 6.75.

[18] Ibid., para. 6.76.

[19] See Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić*, para. 3.9.4, and *State of the Netherlands v. Nuhanović*, para. 3.9.4.

[20] See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

[21] European Court of Human Rights (Grand Chamber), *Jaloud v. The Netherlands*, application No. 47708/08, judgment, 20 November 2014.

[22] Ibid., para. 74. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

Article 7
Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

International decisions

European Court of Human Rights

16. In assessing admissibility in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the Grand Chamber of the European Court of Human Rights referred to article 5 (now article 7) of the draft articles on the responsibility of international organizations as relevant law and practice.[23] Citing the ILC commentary to article 5 (now article 7) of the articles, in the version provisionally adopted in 2004, the court pointed out that:

> The report [of the ILC containing the commentary] noted that it would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation.[24]

17. In relation to the question whether the impugned action could be attributed to KFOR, the court

> consider[ed] it essential to recall at this point that the necessary ... donation of troops by willing TCNs means that, in practice, those TCNs retain some authority over those troops (for reasons, inter alia, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO's command of operational matters was not therefore intended to be exclusive, but the essential question was whether, despite such TCN involvement, it was "effective".[25]

After examining the command and control structures of KFOR and its relationship with the Security Council, the court found "that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO".[26] The court continued to observe that:

> In such circumstances ... KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN within the meaning of the word outlined at paragraphs 29 and 121 [referring to article 4 of the articles on the responsibility of international organizations] above.[27]

18. Answering the question whether the impugned action could be attributed to UNMIK, the court explained:

> In contrast to KFOR, UNMIK was a subsidiary organ of the UN. Whether it was a subsidiary organ of the SG or of the UNSC, whether it had a legal personality separate to the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also respected the role of the UNSC for which Article 24 of the Charter provided, UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC (see ILC report ...

[23] See European Court of Human Rights, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*.
[24] Ibid., para. 32.
[25] Ibid., para. 138.
[26] Ibid., para. 140.
[27] Ibid., para. 141. See also the discussion in para. 10.

above). While UNMIK comprised four pillars (three of which were at the time led by UNHCR, the OSCE and the EU), each pillar was under the authority of a Deputy SRSG, who reported to the SRSG who in turn reported to the UNSC (Article 20 of UNSC Resolution 1244).

Accordingly, the Court notes that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, "attributable" to the UN in the same sense.[28]

The court found that it was "therefore the case that the impugned action and inaction are, in principle, attributable to the UN"[29] and "conclude[ed] that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the [European] Convention".[30]

European Court of Human Rights

19. In assessing admissibility in *Berić and Others v. Bosnia and Herzegovina*, the Grand Chamber of the European Court of Human Rights stated that the "key question ... is whether the UNSC, in delegating its powers by UNSC Resolution 1031, retained effective overall control (see draft article 5 of the Draft Articles on the Responsibility of International Organisations ...)".[31] The Court found that the Security Council retained "effective overall control" as the delegation from the Security Council "was neither presumed nor implicit, but prior to and explicit in the Resolution itself".[32] The court further noted that: "Secondly, the Resolution (read together with the annexed Peace Agreement and the Conclusions of the London Peace Implementation Conference to which it expressly referred) put sufficiently defined limits on the delegation."[33] Thirdly, the court emphasized that "the High Representative was required by the Resolution to report to the UNSC, so as to allow the UNSC to exercise its overall control (thus, the UNSC was to 'remain seized of the matter' under Paragraph 40 of the Resolution)".[34] The court then came to the conclusion expounded above "that the impugned action was, in principle, 'attributable' to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations".[35]

European Court of Human Rights

20. In establishing that the applicant fell within the jurisdiction of the United Kingdom in *Al-Jedda v. United Kingdom*, the Grand Chamber of the European Court of Human Rights referred to article 5 (now article 7) of the articles on the responsibility of international organizations, in the version provisionally adopted in 2004, as relevant international law materials and cited paragraphs (1), (6) and (7) of the commentary to article 5 (now article 7).[36] In its assessment, the court stated:

It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to

[28] Ibid., paras. 142-143.
[29] Ibid., para. 144.
[30] Ibid., para. 152.
[31] European Court of Human Rights (Fourth Section), *Berić and Others v. Bosnia and Herzegovina*, para. 27.
[32] Ibid., paras. 27-28.
[33] Ibid., para. 28.
[34] Ibid.
[35] Ibid. See also the discussion in para. 11.
[36] European Court of Human Rights (Grand Chamber), *Al-Jedda v. United Kingdom*, application No. 27021/08, judgment, 7 July 2011, para. 56.

> establish attribution was that set out by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct. ... For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations.[37]

After finding that the relevant detention facility in Basra City was controlled exclusively by British forces and that the decision to hold the applicant in internment was made by the British officer in command of the detention facility,[38] the court agreed "with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purpose of Article 1 of the Convention".[39]

European Court of Human Rights

21. In the *Jaloud v. The Netherlands* case, the Grand Chamber of the European Court of Human Rights considered the cases of *Mustafić v. State of the Netherlands* and *Nuhanović v. State of the Netherlands* before Dutch courts to be relevant domestic case-law.[40] In this context, the court cited excerpts from the judgment of the Supreme Court of the Netherlands in *State of the Netherlands v. Nuhanović* that discussed article 7 of the articles of the responsibility of international organizations.[41]

National decisions

United Kingdom House of Lords

22. In *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* the United Kingdom House of Lords discussed the judgment of the European Court of Human Rights in the case of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, stating that: "It was common ground between the parties that the governing principle is that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organizations (adopted in May 2004 and cited by the European Court in *Behrami and Saramati*, para. 30)".[42] The House of Lords further observed that: "The European Court also quoted (para. 31) from paras 1 and 6-7 of the ILC's authoritative commentary on this article ...".[43] Distinguishing the *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* case on the facts, the House of Lords concluded that "it cannot realistically be said that US and UK

[37] Ibid., para. 84.
[38] Ibid., para. 85.
[39] Ibid., para. 86.
[40] See European Court of Human Rights, *Jaloud v. The Netherlands*, paras. 70-74.
[41] Ibid., para. 74. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.
[42] See "Opinions of the Lords of Appeal", in House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, case No. [2007] UKHL 58, judgment, 12 December 2007, para. 5.
[43] Ibid.

forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant".[44]

District Court of The Hague

23. The District Court of The Hague in *Mustafić-Mujić v. State of the Netherlands* and in *Nuhanović v. State of the Netherlands* explained that:

> If a public body of state A or (another) person or entity with public status (according to the law of state A) is made available to state B in order to implement aspects of the authoritative power of state B, then the actions of that body, person or entity are considered as actions of state B. This rule, considered international common law, is part of the articles accepted by the International Law Commission (ILC) under the auspices of the United Nations concerning the liability of states. According to this rule the attribution should concern acting with the consent, on the authority and "under direction and control" of the other state and for its purposes.[45]

The District Court of The Hague further stated that:

> In accordance with the existing international practice and the "draft articles" of the ILC concerning the liability of international organizations, the court applies this rule by means of analogy to the attribution of the actions of armed forces made available by states to the United Nations. The court therefore considers incorrect [the claimants'] assertion that the making available of Dutchbat to the United Nations can have no legal consequences under international law for the citizens of Bosnia-Herzegovina.[46]

The District Court then concluded "with reference to the legal framework for assessment given under 4.8 and 4.10 [4.6 and 4.8], that these acts and omissions [of Dutchbat] should be attributed strictly, as a matter of principle, to the United Nations".[47]

Court of Appeal of The Hague

24. The Court of Appeal of The Hague in *Mustafić-Mujić v. State of the Netherlands* and in *Nuhanović v. State of the Netherlands* stated that:

> In international law literature, as also in the work of the ILC, the generally accepted opinion is that if a State places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed, depends on the question which of both parties has "effective control" over the relevant conduct.
>
> ...
>
> This opinion has also found expression in the draft articles on the Responsibility of international organizations of the ILC, of which Article 6 reads as follows:
>
> "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization

[44] Ibid., para. 23.

[45] District Court of The Hague, *Mustafić-Mujić v. State of the Netherlands*, case No. 265618/HA ZA 06-1672, judgment, 10 September 2008, para. 4.10, and *Nuhanović v. State of the Netherlands*, case No. 265615/HA ZA 06-1671, judgment, 10 September 2008, para. 4.8.

[46] Ibid.

[47] Ibid., para. 4.13, and ibid., para. 4.11.

> shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."
>
> Although strictly speaking this provision only mentions "effective control" in relation to attribution to the "hiring" international organization, it is assumed that the same criterion applies to the question whether the conduct of troops should be attributed to the State who places these troops at the disposal of that other international organization.[48]

The Court of Appeal continued to explain that it

> adopts as a starting point that the possibility that more than one party has "effective control" is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised "effective control" over the alleged conduct and will not answer the question whether the UN also had "effective control".[49]

The Court of Appeal concluded "that the State possessed 'effective control' over the alleged conduct of Dutchbat that is the subject of Mustafić et al.'s claim and that this conduct can be attributed to the State".[50]

Supreme Court of the Netherlands

25. On the question whether "attribution of the conduct of such a troop contingent [Dutchbat] should be made by reference to article 6 DARIO and not by reference to article 7 DARIO",[51] the Supreme Court of the Netherlands, in *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, explained that:

> It is apparent from the Commentary on article 7 DARIO ... that this attribution rule applies, inter alia, to the situation in which a State places troops at the disposal of the United Nations in the context of a UN peace mission, and command and control is transferred to the United Nations, but the disciplinary powers and criminal jurisdiction (the "organic command") remain vested in the seconding State. It is implicit in the findings of the Court of Appeal that this situation occurs in the present case. After all, in finding of law 5.10 of the interim judgment the Court of Appeal has held — and this has not been disputed in the cassation appeal — that it is not at issue that the Netherlands, as the troop-contributing State, retained control over the personnel affairs of the military personnel concerned, who had remained in the service of the Netherlands, and retained the power to punish these military personnel under disciplinary and criminal law. The submission in part 1 of the cassation appeal that the Court of Appeal has failed to apply the attribution rule of article 6 DARIO and has instead wrongly applied the attribution rule of article 7 DARIO therefore fails.[52]

[48] Court of Appeal of The Hague, *Mustafić-Mujić v. State of the Netherlands*, case No. 200.020.173/01, judgment, 5 July 2011, para. 5.8, and *Nuhanović v. State of the Netherlands*, case No. 200.020.174/01, judgment, 5 July 2011, para. 5.8.

[49] Ibid., para. 5.9, and ibid., para. 5.9.

[50] Ibid., para. 5.20, and ibid., para. 5.20.

[51] Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić*, para. 3.10.1, and *State of the Netherlands v. Nuhanović*, para. 3.10.1.

[52] Ibid., para. 3.10.2, and ibid., para. 3.10.2.

England and Wales High Court (Queen's Bench Division)

26. In *Serdar Mohammed v. Ministry of Defence* and *Mohammed Qasim & Others v. Secretary of State for Defence*, the England and Wales High Court (Queen's Bench Division) recalled that:

> The appellate committee of the House of Lords (by a 4-1 majority) decided this issue in favour of the claimant. Lord Bingham, who gave the leading speech, identified ... the governing principle in attributing responsibility as that expressed by the International Law Commission ("ILC") in Article 5 (now draft Article 7) of its Draft Articles on the Responsibility of International Organisations.[53]

Discussing the case of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* before the European Court of Human Rights as well as the case of *Al-Jedda v. United Kingdom* before the House of Lords and the European Court of Human Rights, the High Court found that it was "quite clear that the detention of [Serdar Mohammed] is attributable to the United Kingdom. It is unnecessary ... to consider the possibility of joint responsibility, as ... it [is] equally clear that the acts involved in the detention of [Serdar Mohammed] are not attributable to ISAF or the UN".[54]

England and Wales Court of Appeal (Civil Division)

27. In *Serdar Mohammed & Others v. Secretary of State for Defence* and *Yunus Rahmatullah & the Iraqi Civilian Claimants v. Ministry of Defence and Foreign and Commonwealth Office*, the England and Wales Court of Appeal (Civil Division) recalled that "Lord Bingham (with whom Baroness Hale and Lord Carswell agreed for the reasons he gave) explained that it was common ground between the parties that the governing principle was that expressed by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organizations".[55] The court also observed that:

> Referring to Article 5 of the International Law Commission draft Articles on the Responsibility of International Organizations, the Grand Chamber [of the European Court of Human Rights in the case of *Al-Jedda v. United Kingdom*] considered that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that, accordingly, the applicant's detention was not attributable to the UN.[56]

After analysing the judgment of the England and Wales High Court, the Court of Appeal stated "that the judge was clearly entitled to conclude and was correct in his conclusion that it is the United Kingdom and not ISAF which is responsible for [Serdar Mohammed's] detention. In these circumstances it is not necessary to address further submissions in relation to issues of joint responsibility".[57]

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[53] Royal Courts of Justice (England and Wales High Court, Queen's Bench Division), *Serdar Mohammed and Others v. Ministry of Defence*, case No. HQ12X03367, judgment, 2 May 2014, para. 165.

[54] Ibid., para. 187.

[55] Royal Courts of Justice (England and Wales Court of Appeal, Civil Division), *Serdar Mohammed and Others v. Secretary of State for Defence*, case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, judgment, 30 July 2015, para. 57.

[56] Ibid., para. 60.

[57] Ibid., para. 72.

The Hague District Court

28. In *Stichting Mothers of Srebrenica and Others v. State of the Netherlands*, the Hague District Court recalled that:

> In the Nuhanović and Mustafić cases the Supreme Court ruled that the criterion for attributing Dutchbat's actions to the State is whether the State exercised *effective control* over said actions. The Supreme Court derives this criterion from Section 7 of the *Draft Articles on Responsibility of International Organisations* (hereinafter to be referred to as: DARIO) that the *International Law [Commission (ILC)]* has drawn up. In the cases referred to the Appeals Court considered that though this provision of *effective control* is only mentioned in relation to attribution to the UN the same criterion holds when answering the question whether actions of troops must be attributed to the state that placed them at the disposal of others. The Supreme Court considered that the IL[C]'s DARIO recommendations and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter to be referred to as: DARS) may generally be accepted as a reflection of current, unwritten international law and were apparently accepted as such even in 1995.[58]

The court further stated that: "*Effective control* means the actual say or *'factual control'* of the State over Dutchbat's specific actions. Whether or not this is a point of discussion must be assessed in terms of the circumstances surrounding the case."[59]

Higher Administrative Court of North Rhine-Westphalia

29. The Higher Administrative Court of North Rhine-Westphalia, in *Anonymous v. Federal German Government*, referred to article 7 of the articles on the responsibility of international organizations when addressing the question whether the transfer of a detained pirate to Kenya conducted as part of the European Union-led naval force (EUNAVFOR) (Operation Atalanta) was attributable to Germany. The court stated that even if

> one assumed, in principle, that the Federal Republic of Germany was possibly not responsible due to the integration in the command structure of the EU, the conditions stipulated in international law for the (exclusive) responsibility of the participating international organizations — here the EU and/or the UN — would not be present. Pursuant to article 7 of the "Draft articles on the Responsibility of International Organisations" of the International Law Commission (ILC), an international organization is only responsible for the wrongful conduct of an organ placed at its disposal if it had effective control over the concrete action .... In a decision invoked by the defendant, the European Court of Human Rights appears to have used this principle, which already constitutes customary international law, in a modified form ("ultimate authority and control — UAAC") (European Court of Human Rights, Decision of 2 May 2007 — 71412/01 (Behrami and others) — NVwZ 2008, 645, Rn. 138 ff.). In doing so, the European Court of Human Rights turns the

[58] District Court of The Hague, *Stitching Mothers of Srebrenica v. State of the Netherlands*, case No. C/09/295247/HA ZA 07-2973, judgment, 16 July 2014, para. 4.33 (original emphasis). See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

[59] District Court of The Hague, *Stitching Mothers of Srebrenica v. State of the Netherlands*, para. 4.34.

> attention to the global consideration of overall responsibility for an operation — the individual action does not seem decisive anymore.[60]

The Court explained that it would not have to decide which test was applicable because the application of either test would result in the attribution of the relevant conduct to Germany. In particular, the court noted the participating States had "effective and ultimate control" over the operation,[61] and that Germany continuously had control over the concrete transfer of the applicant to Kenya.[62] Discussing both tests, the court rejected the argument of the defendant that the relevant conduct was only attributable to the United Nations and/or the European Union.

England and Wales High Court (Queen's Bench Division)

30. In *Kontic and Others v. Ministry of Defence*, the England and Wales High Court (Queen's Bench Division) noted that: "The Claimants also rely upon what they submit to be widespread criticism of the *Behrami and Saramati* decision. The Claimants rely firstly upon the commentary by the International Law Commission in 2011 on DARIO. The ILC addressed what was by then Article 7."[63] The court continued to discuss the relevant passages of the commentaries to article 7 of the articles of the responsibility of international organizations, relevant case law before the European Court of Human Rights as well as courts in the United Kingdom, and academic literature.[64] The court then observed that: "While [it] acknowledge[s] the calibre of the ILC Commentary, and of some of the academic criticisms of *Behrami and Saramati*, [it] cannot in the end conclude the arguments are persuasive. The better reading of the evidence is that KFOR was indeed under the effective control of the SRSG, and thus the UN."[65] The court also added that: "The Claimants have raised the possibility of dual attribution in this case. However, putting the matter shortly, [it] see[s] no support for that approach in any of the leading cases."[66] The court thus concluded "that the relevant acts and omissions complained of are as a matter of law attributable to the United Nations, and not to the United Kingdom".[67]

Article 8
Excess of authority or contravention of instructions

International decisions

Caribbean Court of Justice

31. In *Trinidad Cement Limited v. The Caribbean Community*, the Caribbean Court of Justice referred to the articles on the responsibility of international organizations when assessing whether Trinidad Cement Limited, a company incorporated in Trinidad and Tobago, had *locus standi* according to the Revised Treaty of Chaguaramas in order to commence proceedings against the Caribbean

[60] Higher Administrative Court of North Rhine-Westphalia, Fourth Chamber, Case No. 4 A 2948/11, Judgment, 18 September 2014, para. 1.4.2 (unofficial translation by the Secretariat).
[61] Ibid., para. 1.4.2.2.
[62] Ibid., para. 1.4.3.
[63] Royal Courts of Justice, *Kontic and Others v. Ministry of Defence*, para. 108.
[64] Ibid., paras. 108-120.
[65] Ibid., para. 131.
[66] Ibid., para. 132.
[67] Ibid., para. 135.

Community.[68] Referencing chapter V of the 2004 report of the International Law Commission,[69] the court explained that:

> The search in the application and interpretation of the Revised Treaty is to discover Community law. In this quest the Court has to apply such rules of international law as may be applicable [Art 217 (1) of the Revised Treaty]. Part of that law is the emerging customary international law on, for example, the concept of *ultra vires* acts of organs of international organizations.[70]

National decisions

England and Wales High Court (Queen's Bench Division)

32. In *Serdar Mohammed v. Ministry of Defence* and *Mohammed Qasim & Others v. Secretary of State for Defence*, the England and Wales High Court (Queen's Bench Division) asked whether

> it [would] make a difference whether [Serdar Mohammed's] detention fell outside the scope of the authority conferred by the UNSCRs which established ISAF's mandate in Afghanistan? This question was not addressed in argument. It appears, however, that it would not, in the light of Article 8 of the ILC Draft Articles on the Responsibility of International Organisations.[71]

Part Four
The implementation of the international responsibility of an international organization

Chapter I
Invocation of the responsibility of an international organization

Article 48
Responsibility of an international organization and one or more States or international organizations

International decisions

European Court of Human Rights

33. In *Jaloud v. The Netherlands* the Grand Chamber of the European Court of Human Rights considered the cases of *Mustafić v. State of the Netherlands* and *Nuhanović v. State of the Netherlands* before Dutch courts as relevant domestic case-law.[72] In this context, the court cited an excerpt from the judgment of the Supreme Court of the Netherlands in *State of the Netherlands v. Nuhanović* in which the court noted that, inter alia, "international law, in particular article 7 DARIO in conjunction with article 48 (1) DARIO, does not exclude the possibility of dual attribution of a given conduct".[73]

[68] Caribbean Court of Justice, *Trinidad Cement Limited v. The Caribbean Community*, case No. [2009] CCJ 2 (OJ), judgment, 5 February 2009, para. 41.

[69] Ibid. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

[70] Caribbean Court of Justice, *Trinidad Cement Limited v. The Caribbean Community*, para. 41.

[71] See Royal Courts of Justice, *Serdar Mohammed and Others v. Ministry of Defence*, para. 179.

[72] European Court of Human Rights, *Jaloud v. The Netherlands*, paras. 70-74.

[73] Ibid., para. 74. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

National decisions

Supreme Court of the Netherlands

34. In *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, the Supreme Court of the Netherlands stated that article 48 (1) of the articles on the responsibility of international organizations "expressly leaves open the possibility of more than one State or organization being held responsible for the consequences of an internationally wrongful act".[74]

The Hague District Court

35. The Hague District Court in *Stichting Mothers of Srebrenica and Others v. State of the Netherlands* noted with regard to the assessment of effective control under article 7 of the articles on the responsibility of international organizations that "it should be remembered that under Clause 48 DARIO the same act and/or acts might be attributed to both the State and the UN under what is called '*dual attribution*'".[75]

Part Five
Responsibility of a State in connection with the conduct of an international organization

Article 61
Circumvention of international obligations of a State member of an international organization

African Commission on Human and Peoples Rights

36. In *Communication 409/12, Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, the African Commission on Human and Peoples Rights, when assessing whether the member States of the Southern African Development Community could be held responsible for the suspension and permanent ouster of the Southern Africa Development Community Tribunal, noted that:

> The Complainant argues further that by Articles 61(1) and 62(1) of the Draft Articles on the Responsibility of International Organisations as well as by General Principles of International Law, the Respondent States cannot escape liability for breach [of] their international responsibilities by the mere fact that they have established an international organisation, especially if the wrongful act of the International Organisation would have constituted a breach of international human rights obligations were they perpetuated by the states themselves.[76]

While not explicitly referring to the articles in its assessment:

> The Commission agree[d] with the Complainant that the correct position of contemporary international law is that in appropriate cases, Member States of an International Organisation could bear direct responsibility for the wrongful

[74] See Supreme Court of the Netherlands, *State of Netherlands v. Mustafic-Mujić*, para. 3.9.4, and *State of Netherlands v. Nuhanović*, para. 3.9.4.

[75] District Court of the Hague, *Stitching Mothers of Srebrenica v. State of the Netherlands*, para. 4.34.

[76] African Commission on Human and Peoples Rights, *Luke Munyandu Tembani and Benjamin John Freeth*, communication 409/12, decision on merits, 30 April 2014, para. 126.

> acts and omissions of that International Organisation especially where the rights of third parties are involved.[77]

The Commission concluded that

> the current trend in International Law is that where states transfer sovereign powers to an International Organisation and in the course of carrying out the functions assigned to it the International Organisation occasions wrongs that would have invoked the international responsibility of the Member States individually had they acted on their own, the States can individually bear responsibility for those wrongful acts and omissions of the International Organisation. The Complainant has made compelling and uncontested arguments that the Respondent States are collectively responsible for the acts and omissions that constitute the alleged violations of Articles 7 and 26 of the [African] Charter.[78]

Article 62
Responsibility of a State member of an international organization for an internationally wrongful act of that organization

African Commission on Human and Peoples Rights

37. In *Communication 409/12, Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, the African Commission on Human and Peoples Rights took note of the complainant's reference to article 62, paragraph 1, of the articles on the responsibility of international organizations.[79]

Part Six
General provisions

Article 67
Charter of the United Nations

European Court of Human Rights

38. In assessing the grant of immunity to the United Nations in *Stichting Mothers of Srebrenica and Others v. The Netherlands*, the European Court of Human Rights recalled the applicant's argument that

> in its comments on the International Law Commission's Draft Articles on the Responsibility of International Organizations the Secretariat of the United Nations itself had recognised differences between States and international organisations on the one hand and international organisations among themselves on the other, but had nonetheless made it clear that it considered the United Nations an international organisation within the meaning of those draft articles.[80]

39. The court then continued to "tak[e] note of the various understandings of the immunity of the United Nations in State practice and international legal doctrine" and observed that:

[77] Ibid., para. 132.
[78] Ibid., para. 134.
[79] Ibid., para. 126. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.
[80] European Court of Human Rights (Third Section), *Stitching Mothers of Srebrenica v. The Netherlands*, application No. 65542/12, decision, 11 June 2013, para. 130.

> In relation to peacekeeping operations, which are seen as "subsidiary organs" of the United Nations, the Secretariat of the United Nations applies a functional "command and control" test as regards accountability but maintains that the organisation enjoys immunity in the local courts (Report of the United Nations Secretary-General entitled "Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters" and "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations", UN Doc A/51/389, paragraphs 7 and 17; "Responsibility of international organizations: Comments and observations received from international organizations", UN Doc A/CN.4/637/Add.1). Meanwhile, the Draft Articles of the International Law Commission on the Responsibility of International Organizations are "without prejudice" to the Charter of the United Nations ([...]; see Draft Article 67).[81]

The court ultimately found that "in the present case the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate".[82]

[81] Ibid., para. 141.
[82] Ibid., para. 169.